No. 15,712

United States Court of Appeals

For the Ninth Circuit

BABETTA SCHMIDT,
Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

On Petition to Review a Decision of the Tax Court of the United States.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The opinion of the Tax Court in cause No. 54932 is found in the transcript (R. 97) and is officially reported as 28 T.C. No. 38.

JURISDICTION.

Jurisdiction of this court is based upon a petition for review (R. 5) of a decision of the Tax Court of the United States entered on August 2, 1957 (R. 103) denying a credit of $2,378.00, which was an overpayment on the 1944 estimated income tax, as against the 1945 income tax, and declaring that the Appellant's

failure to file timely individual income tax returns was not due to reasonable cause, so that penalties for the years 1945, 1946, 1947, 1948, and 1951 were properly asserted by the Commissioner of Internal Revenue. The Appellant's Federal Income Tax Returns were filed in the collector's office in San Francisco, California, and the Appellant resides in San Francisco, California, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Jurisdiction of this court is invoked pursuant to U.S.C. Title 26, Sec. 7482 (a). The venue is established by U.S.C. Title 26, Sec. 7482 (b) (1).

QUESTIONS PRESENTED.

1. Should the Commissioner be allowed to retain the sum of $2,378.00, which was an overpayment on the 1944 estimated income tax, and which he refused to apply as a credit to the 1945 income tax as requested by the Appellant.

2. Should the Commissioner be allowed to assert penalties on the income tax returns of the Appellant, when the failure to file timely individual income tax returns was due to reasonable cause.

STATUTES AND REGULATIONS INVOLVED.

The statutes involved in this case are Section 322 (b) (1) and (e) and Sec. 291 (A) of the Internal Revenue Code of 1939.

Sec. 322—Refund and Credits

(b) Limitation of Allowance

1. Period of Limitation.—Unless a claim for refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. . . .

(e) Presumption as to Date of Payment

For purposes of this section, any amount paid as estimated tax for any taxable year shall be deemed to have been paid not earlier than the fifteenth day of the third month following the close of such taxable year.

Sec. 291. Failure to File Return

(A) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. . . .

STATEMENT OF THE CASE.

There is a Stipulation of Facts herein (R. 27) and an Official Report of the Proceedings before The Tax

Court of the United States on August 29, 1956. The facts may be summarized as follows:

The Appellant, who is 83 years of age, is a resident of San Francisco, California, and files her Federal Income Tax Returns with the District Director of Internal Revenue at San Francisco, California. The Appellant's declaration of estimated income tax for the year 1944 estimated her tax liability at $2,473.00, which she paid in four equal installments, the last payment being made on January 4, 1945.

Appellant's 1944 individual income tax return, Form 1040, filed on June 30, 1952, as stated in paragraph 3 of the Stipulation of Facts (R. 27) indicated no liability and requested that the overpayment of $2,473.00 be credited on the 1945 estimated tax. No Form 1040-ES, Declaration of Estimated Tax was filed for the year 1945.

Appellant's 1945 individual income tax return, Form 1040, filed on June 30, 1952, as stated in paragraph 3 of the Stipulation of Facts showed the $2,-473.00 on line 7 (B) as a payment on a 1945 declaration of estimated tax. The tax liability shown on line 6 was then reduced by the $2,473.00, leaving a balance of tax due on line 8.

The Commissioner has determined deficiencies for 1944 and 1945, and has applied a portion of the $2,473.00 in payment of the deficiency for 1944, i.e., $95.00. No part of the $2,473.00 has been allowed in satisfaction of Appellant's tax liability for 1945 or any later year. (R. 29.)

In the Stipulation of Facts on file herein, it is stipulated by and between Appellant and Appellee that Appellant has made payments on her income tax liability for the year 1951 in the amount of $7,475.43. (R. 28.)

At the time that the Appellant's 1944 income tax return was due, she was over the age of 70 years. Appellant had at that time been a widow for many years, and was and still is unfamiliar with business, except that she owned some houses that she rented. (R. 55.) Born in Germany, she had lived in the United States for almost 60 years. (R. 55.) At the trial she demonstrated that her ability to comprehend and communicate was uncertain and unlimited.

Appellant understood that she had an obligation to file income tax returns. (R. 56.) However, she herself did not understand how to do this or what she had to do to comply with this obligation. (R. 57.) Therefore, she had always found it necessary to have help in preparing and filing her returns. Prior to her husband's death, she had taken the information to the Internal Revenue Service for assistance. (R. 64.)

About 1932 (R. 85) she retained one Stephen Farrelly to do her income tax work, and she employed him thereafter continuously until 1953. (R. 53.) Mr. Farrelly held himself out to be a Tax Consultant, Auditor and Public Accountant, and continued to hold himself out as such up to the time he was discharged by Appellant in 1953. (R. 66.) His letterheads have the statement "Public Accountant-Tax

Consultant" as late as 1953. (Petitioner's Exhibit No. 1, R. 79.) Appellant had retained Mr. Farrelly because he had been recommended to her by her sons, who were businessmen and who also retained Mr. Farrelly to prepare their tax returns. (R. 58, 84.) Mr. Farrelly was employed by her sons in this capacity from 1930 to 1951. (R. 56.)

Each year the Appellant would telephone Mr. Farrelly about her income tax, and he came to her house to get the information. (R. 58.) This information was kept in an account book by the Appellant's daughter. (R. 58.) In this account book were adequately recorded the receipts and disbursements and the necessary information for the preparation of the income tax returns. (R. 88.) Mr. Farrelly took the information given to him by the Appellant, and later would return with papers for her to sign, and ask her for money for the government. (R. 62.) Appellant did not know what she was signing. (R. 62.) She did not know whether the form was an income tax return or a declaration of estimated tax. (R. 62.) She relied on Mr. Farrelly and always believed that she had filed all of the necessary papers and returns for the government. (R. 64.)

During the period in question, 1944 to 1952 inclusive, Form 1040-ES was filed for the years 1944, 1946, 1948, 1949, 1950, and 1951, and with each Form 1040-ES, Appellant made a tax payment to the Internal Revenue Service. (R. 27.) She paid Mr. Farrelly what he asked for the services he was employed to perform. (R. 61.) Such payment averaged about

$200.00 per year. (R. 79.) Payments were made in each of the years 1944 to 1952, except for 1949, and in 1948 she made payments totalling $300.00, which included a payment of $100.00 on December 31, 1948. (R. 78.)

Income Tax returns, Form 1040, were not timely filed for the years 1944 to 1949, and 1951. Appellant did not know or discuss this until 1952, when Mr. Farrelly came to her home with the income tax returns for the years 1944 to 1951, inclusive, and asked her to sign them. (R. 85.) Her sons were present at the time, and they asked Mr. Farrelly why the income tax returns had not been filed before. Mr. Farrelly stated that he had been sick, and had just got busy and got them all ready and there they were. (R. 85.) At the same time, he presented a bill for $500.00, which the sons refused to let the Appellant pay. (R. 85.) Mr. Farrelly told the Appellant and her sons at that time that there was nothing to worry about, and that all Appellant had to do was to pay what was due on the various income tax returns and everything would be all right. (R. 86.) Mr. Farrelly had obtained an extension of time for the year 1950 only. (R. 82.)

At the time of preparing these returns in 1952, Mr. Farrelly also prepared an affidavit which stated that the failure to file timely the returns for the years in question was not due to any fault of the Appellant, but was due wholly to the prolonged illness of her accountant. (Respondent's Exhibits A and B, R. 88, 89.) At the trial, Mr. Farrelly stated that he had

prepared this affidavit, that he was the accountant referred to, and that the statements contained in the affidavit were true of his own knowledge. (R. 91.) Mr. Farrelly stated that the income tax returns for the years in question were not prepared by him for the Appellant to sign until 1952. (R. 72.)

SPECIFICATION OF ERRORS.

Appellant relies upon the following errors of the court below:

1. The Tax Court erred in deciding that the Appellant's overpayment of 1944 estimated tax in the sum of $2,378.00 could not be taken as a credit against the 1945 income tax.

2. The Tax Court erred in deciding that Appellant's failure to file timely income tax returns was not due to reasonable cause.

3. The Tax Court erred in failing to enter a decision that there were no penalties on income tax due from Appellant for the years 1945, 1946, 1947, 1948, and 1951.

ARGUMENT.

1. The facts established that the Appellant paid the government the sum of $2,473.00 on her 1944 Declaration of Estimated Tax, and that aside from the $95.00 allowed by the government in satisfaction of her 1944 liability, no part thereof has ever been refunded or credited to her, nor has she received any benefit therefor.

Under the circumstances, unless the Statute of Limitations bars a refund or credit, it would be manifestly unjust and inequitable to permit the government to retain the money and not give Appellant credit therefor.

Rittenbaum v. U.S., 109 Fed. Supp. 480.

(a) The Statute of Limitations does not bar the Appellant from the benefit of the credit claimed. Under the Internal Revenue Code of 1939, Sec. 322 (b) (1), the period for filing claims for refund or credit of income tax is:

(1) three years from the date the return was filed or

(2) two years from the time the tax was paid, whichever is the later.

Internal Revenue Code of 1939, Sec. 322 (b) (1).

The provisions of the law relating to limitations as contained in Chap. 66 of the 1954 Code apply only to taxes imposed by the 1954 Code, and the provisions of the 1939 Code relating to limitations continue to apply with respect to taxes imposed by the 1939 Code.

Thus the provisions of Section 322 of the 1939 Code apply to a claim for refund or credit of income tax for the calendar year 1944, whether such claim is filed before or after the date of enactment of the 1954 Code.

Mertens, Law of Federal Income Taxation, 1956 Cum. Supp. Sec. 58.02.

In this case, the Appellant's claim for credit was timely under either one or both of the aforesaid periods of limitation.

(1) Filing of the Return.

In this case, the 1944 Form 1040 was filed on June 30, 1952. (R. 27.) The return disclosed for 1944 an overpayment in the sum of $2,473.00 and requested that the same be credited on the 1945 Estimated Tax. (R. 29.) On the same date, June 30, 1952, the Appellant filed her 1945 Form 1040, reflecting the $2,473.00 as a payment on 1945 Declaration of Estimated Tax and reduced the tax liability shown on line 6 by said amount, leaving a balance of tax due on line 8. Appellant thus claimed credit for the amount of overpayment disclosed by the 1944 return. (R. 29.)

The filing of the 1945 return claiming the credit constituted a claim for refund or credit.

Rittenbaum v. U. S., supra;
Treasury Regulation 111, Sec. 29.322-3.

This claim for credit was timely under Sec. 322 (b) (1). It was within three years of the filing of the return for 1944.

(2) In any event the claim was timely because made within two years of the date of payment.

It is evident from the cases that not every transfer of money by a taxpayer to a Federal tax authority will constitute a "payment" within the meaning of Sec. 322 (b) (1).

A money transfer does not itself define the tax obligation. Some further act is necessary.

Dubuque Packing Co. v. U. S., 126 Fed. Supp. 796;

Rosenman v. U. S., 323 U.S. 658, 65 S. Ct. 536;

Thomas v. Mercantile Bank, 204 Fed. (2d) 943.

A money transfer to a Federal tax authority (regardless of the original reason for the transfer) should start the statute of limitations running only on the date the tax obligation becomes defined.

Dubuque Packing Co. v. U. S., supra;
Rosenman v. U. S., supra;
Thomas v. Mercantile Bank, supra.

The obligation becomes defined either by the filing of a return or an assessment by the Commissioner. Until the obligation is so defined, there is no "payment of tax" within the meaning of 322 (b) (1) which can commence the running of the Statute of Limitations.

Dubuque Packing Co. v. U. S., supra;
Rosenman v. U. S. supra;
Thomas v. Mercantile Bank, supra.

Thus, here there was no payment within the meaning of the Statute of Limitations, and it did not begin to run until the 1944 return was filed and the obligation thus defined. The 1945 return claiming the credit was filed on the same day, constituted a claim for credit and was therefore within the limitation period.

In *Garvin v. U. S.* (Ct. Cl. 1953) 111 F. Supp. 265, 43 A.F.T.R. 784, taxes were withheld from Garvin's earnings in 1945, 1946, and 1947. Garvin filed no return and no claim for refund until June 1, 1951. The Court held that the filing of the claim occurred at the time the return was filed, June 1, 1951, that three years prior thereto was June 1, 1948, that all tax payments were made in earlier years and that Section 322 (b) (2) prohibited payment of a refund.

In the opinion of the Court in *Dubuque Packing Co., supra,* the Court of Claims seems to stand alone on this issue, and fails to apply properly the rule of the Supreme Court in *Rosenman v. United States, supra.*

The Current Tax Payments Act of 1943 did not change this rule. Therefore, the rule applies to payments on estimated tax as well as other payments made before liability defined.

Dubuque Packing Co. v. U. S., supra;
Thomas v. Mercantile Bank, supra.

In the *Rosenman* case, *supra,* it is true that the money paid in advance of filing the return was placed by the Collector in a "suspense account". That this

was not a material factor, however, is demonstrated by the application of the same rule in absence of such factor in *Thomas v. Mercantile Bank,* and *Dubuque Packing Co.,* both cited *supra.*

In this case, the taxpayer's return for the year 1944 was filed, as stated above, on June 30, 1952. In view of the foregoing rules of law, it was on that date that the taxpayer's obligations for 1944 income tax became defined. Consequently, it was also on that date that payment of 1944 taxes was made so as to commence the running of the Statute of Limitations on any refund or credit due under the provisions of Sec. 322 (b) (1), cited above.

Sec. 322 (e) provides that any amount paid as estimated tax for any taxable year shall be deemed to have been paid *not earlier* (emphasis added) than the 15th day of the third month following the close of the taxable year. To apply this provision to the payment of the 1945 estimated tax, the payment would be deemed to have been paid not earlier than March 15, 1945.

This does not mean that the provision can be construed to mean that the tax shall be deemed to have been paid not later than March 15, 1945. Section 322 (e) is not in itself a limitation section, but provides an exception to the limitation section, by providing that in no case of estimated tax shall payment have been deemed to have been made earlier than the date specified. The section does not state that the payment shall be deemed to have been made on the 15th

day of the third month following the close of the taxable year.

Here, the taxpayer concededly overpaid her 1944 income taxes in the amount of $2,473.00. She requested that such overpayment be applied as a credit on her 1945 estimated tax by so indicating on her 1944 return. Furthermore, the credit was properly claimed within the statutory period, as a prepayment credit on her 1945 return. Therefore, in view of such fact and the foregoing rules of law, the taxpayer properly claimed the 1944 overpayment of income tax within the statutory rules cited above.

(b) *The Tax Court had jurisdiction to determine the controversy on this claim for credit.*

Claim for credit for part payment of tax in the taxable year in controversy is within the jurisdiction of the Tax Court and is a factor in the redetermination of the asserted deficiency.

Ribbon Cliff Fruit Co. v. Commissioner, 12 BTA 13.

It is immaterial that the Tax Court may not have jurisdiction over the year 1944, because the year in question is 1945, and the issue is whether the Appellant correctly took a credit in computing the amount due for income taxes in 1945. Disallowance of this credit for the year 1945 resulted in a deficiency for 1945, because Appellant did in fact take the credit in computing her tax for that year.

In cases in which the taxpayer shows an amount of tax upon his return, but does not admit that that amount is due and collectible, it is the amount which

he admits to be due and not the amount which appears on the face of the return which is deemed to be the starting point in the computation of a deficiency.

Appeals of Moir et al., 3 BTA 21;
Maria Repetti v. U. S., 55-1 USTC 9396 (1955 CCH), (Dist. Ct. ND Calif.).
(Overruling Motion for Reconsideration of D.C.)

In *Maria Repetti v. U. S.,* 55-1 USTC 9396, 55-1 USTC 9351, the facts were substantially on all fours with those of this case. The plaintiff in that case had filed a declaration of estimated tax for the year 1945 and paid $296.00 as the tax estimated for that year, but part of the $296.00 was in fact an overpayment. In 1952 plaintiff filed returns for the year 1944 through 1949, inclusive. The returns for 1948 and 1949 indicated some tax liability, but plaintiff claimed as a credit against the liability the amount paid as an overpayment on the 1945 declaration of estimated tax. In spite of the contentions of the Commissioner that there was no deficiency from the Commissioner's disallowance of the credit, the Court held that there was a determination of deficiency from the disallowance of the credit, and the question of whether the credit was properly taken required the issuance of a notice of deficiency and was within the jurisdiction of the Tax Court. The Court accordingly issued an injunction against collection.

Repetti v. U. S., supra.

In the case here, the Commissioner erroneously computed the deficiency in a fashion similar to that

in the *Repetti* case. In his computation thereof, the Commissioner erroneously used the tax shown by the return as the starting point for the computation, rather than the amount which the taxpayer admitted to be due and collectible, which was the tax shown less the credit claimed, and which was the proper starting point.

Appeals of Moir, supra;
Repetti v. U. S., supra.

By this action, the Commissioner attempts to assert that the failure to allow this credit is no part of the computation of the deficiency and claims that the Tax Court has no jurisdiction. As in the *Repetti* case, this contention must fail here also.

2. At all times from 1932 to 1952, Appellant relied upon her accountant, Mr. Farrelly, to do what was necessary to discharge her responsibility to the government in the preparation and filing of income tax returns. She, herself, did not have the ability to do this, and she did the reasonable and proper thing under the circumstances, which was the hiring of an accountant. She supplied her accountant with the necessary information for the preparation of the returns and signed what he asked her to sign.

Reliance on accountant to whom was made full disclosure of facts reflected on return was reasonable cause for failure to file personal holding company return.

Hatfried, Inc. v. Commissioner, 162 F. (2d) 628, 47-1 USTC 9294.

When a taxpayer selects a competent expert, supplies him with all necessary information and requests him to prepare proper tax returns, the taxpayer has done all that ordinary business care and prudence can reasonably dictate.

Haywood Lumber and Mining Co. v. Commissioner, 178 Fed. (2d) 769.

In this case, Appellant believed that she had selected a competent accountant; she supplied him with all necessary information, and requested him to prepare proper tax returns. Mr. Farrelly, the accountant, had been recommended by her sons, who were businessmen and much more experienced than she. Mr. Farrelly purported to be an expert tax consultant. No difficulty with his service was discovered until 1952. Her sons continued to employ the same accountant during all the time in question. There was nothing to put Appellant on her guard. It was eminently reasonable for Appellant, who was an old woman, inexperienced in business, and who had the recommendation and example of her experienced, businessmen sons to follow, to select Farrelly as her accountant.

The Second and Fifth Circuits hold as follows:

When a taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare tax returns, the taxpayer has done all that ordinary business care and prudence can reasonably demand, and the penalty under Sec. 291 of the Code cannot be imposed. To receive the protection of this rule, the taxpayer must show that he

selected as an expert a person qualified to advise about matters, and that he supplied his advisor with all pertinent information.

Mertens, Law of Federal Income Taxation (1948), Section 55.23.

Mr. Farrelly, the accountant, had been preparing income tax returns prior to 1930, the year in which he had been recommended to the Appellant's sons by a Mr. Webb. (R. 84.) In turn, the Appellant's sons recommended Mr. Farrelly to the Appellant, to prepare her income tax returns. There was no reason to doubt that Mr. Farrelly was a competent tax expert, and when Appellant supplied him with all necessary information and requested him to prepare proper tax returns, she had done all that ordinary business care and prudence could reasonably demand, and the penalty under Sec. 291 of the Code (1939) should not be imposed.

Mr. Farrelly, in 1930 and prior thereto, held himself out to be a Tax Consultant, Auditor and Public Accountant. (R. 65.) When the California Business and Professions Code was amended in 1937 to require a permit for the practice of public accountancy, Mr. Farrelly did not secure such a permit, but continued in the practice of public accountancy, nevertheless. It would be unreasonable to demand that Appellant require Mr. Farrelly to produce such a permit, or that the Appellant even know that such a permit was required.

The fact that Mr. Farrelly did the accounting work for her businessmen sons was sufficient reason for

this elderly woman to rely upon Mr. Farrelly. His duty was to prepare simple individual income tax returns and have the Appellant sign and file them. His defaults and omissions were not in the field of expert accounting or tax law; he merely failed to act at all. It was not because he lacked a permit or lacked the training of an accountant or tax consultant that the Appellant was charged with penalties.

Reasonable cause has been repeatedly defined by the cases and by the regulations to mean nothing more than "the exercise of ordinary business care and prudence." The standard of care is one personal to the taxpayer, and he is not held to a standard not his own.

Haywood Lumber & Mining Co. v. Commissioner, supra.

The test is whether or not the taxpayer used reasonable business care and prudence in the selection of a competent agent and in relying upon him. The Appellant's sons, who are responsible businessmen, employed Mr. Farrelly and recommended him to their mother. Mr. Farrelly did the work required of him by the sons for many years. The Appellant, without question, did use reasonable business care and prudence in the selection of a competent agent and in relying upon him.

It is well settled that the penalties imposed under the Revenue laws were designed to attach to the conduct of a taxpayer which is intentional, knowing or voluntary, as distinguished from accidental, as evidenced by the words "and not due to willful neglect."

It is also well settled that in the application of penalties all questions of doubt must be resolved in favor of those from whom the penalty is sought.

Hatfried, Inc. v. Commissioner, supra.

The facts of the case here can be characterized in the same way that the Court summed up the facts in *Ragsdale v. Paschal*, 118 F. Supp. 280.

> "Under the uncontradicted and unimpeached evidence in this case, the taxpayer himself was not even at fault in the failure to file this return for 1944. It is true that the duty devolved upon him to file the return, but following the usual and ordinary course of such matters, he took action which ordinarily would have resulted in the return being properly filed. There was no intention on his part not to file the return, and the fact that it was not filed was wholly unintentional on his part. Aside from that he had nothing to gain by not filing it, as he had already filed a Declaration of Estimated Tax and paid the tax for 1944. This falls far short of being 'wilful neglect.' "

The Court went on to hold that there was reasonable cause.

Appellant was not guilty of indifference to the requirements of the law, and her conduct shows a respect for those requirements. The Appellant was an elderly widow, who was not a businesswoman, but who owned some rental properties. The books on the rental properties were not kept by the Appellant, but by her daughter. (R. 64.)

Mr. Farrelly had prepared the income tax returns for the years 1944 to 1951, inclusive, just prior to his visit to the Appellant's home in 1952. He had just gotten around to getting the returns ready for the Appellant to sign. (R. 86.) Mr. Farrelly also prepared an affidavit for the Appellant to sign to be attached to her returns. (Respondent's Exhibits "A" and "B", R. 88, 89.) This affidavit, which he swore under oath on the witness stand was true, stated that the reason that the returns were not filed was not due to any fault of the Appellant, but was entirely due to his (Mr. Farrelly's) illness.

Mr. Farrelly failed in the duty that had been entrusted to him by the Appellant, and Appellant had no notice thereof and reasonably continued to rely on him. Her good faith is demonstrated by the fact that almost immediately after discovery of Mr. Farrelly's default, she engaged a new accountant, the returns were filed and all taxes indicated to be due were promptly paid.

In cases such as *Herbert Marshall,* 41 BTA 1064, where the individual question was simply one of preparing and filing an individual tax return, the taxpayer was held to have used reasonable care in relying upon his *booking agent* in New York who did not even purport to be an accountant or attorney and whom apparently the taxpayer had never even asked to prepare the return but merely took for granted he would do so.

In *Harry Kaufmann,* 13 TCM 348, the tax returns were prepared by the *daughter* of the local attorney,

who was also his secretary but the default was in the failure to file the return because she had mislaid it.

In these cases it was not material that the persons in question were not accountants or attorneys for no question of professional competence is involved.

It is respectfully submitted that under all the facts and circumstances of this case, it can be reasonably said that Appellant's failure to file timely her returns for the years in question was due to reasonable cause and not due to willful neglect. Appellant relies on the following cases, in none of which, it is submitted, are the facts as strongly in favor of the taxpayer as in the instant case.

Herbert Marshall, supra;
Harry Kaufmann, supra;
Lee Fields, 14 TCM 27;
Estate of Frederick C. Kirchner, 46 BTA 578;
Haywood Lumber and Mining Co., supra.

CONCLUSION.

It is submitted that the Tax Court's decision is erroneous in Cause No. 54932 and that the decision should be reversed. The Appellant should receive from the Appellee the sum of $2,378.00, which was an overpayment on the 1944 estimated income tax, with interest from date of payment.

The Appellant should also receive from the Appellee the penalties paid for the years 1945, 1946, 1947, 1948 and 1951 in the total sum of $2,102.99, with the

interest paid thereon by the Appellant, and with interest from date of payment.

Dated, San Francisco, California,
January 22, 1958.

Respectfully submitted,
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Attorney for Appellant.